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87-974

SUPREME COURT, U.S.
FILED
DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1987

PARLOR FURNITURE OF HICKORY, INC.,
PETITIONER,

V.

BURLIN B. MILLER,

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Curt J. Vaught
Counsel of Record
for Petitioner
P.O. Box 3690
Hickory, NC28603
(704) 324-9930

49pp

QUESTION PRESENTED FOR REVIEW

Is the petitioner, Parlor Furniture of Hickory, Inc., a North Carolina Corporation, protected from having its lease terminated under USC §365 (e), which by its terms states that a lease cannot be terminated at any time solely because a clause in the lease conditioned on the commencement of a bankruptcy case, when the sole breach of the lease alleged is the filing of a petition under Chapter 11 of the United States Bankruptcy Laws, and the lease contains a clause stating that a filing of such a petition is a breach of the lease.

PARTIES TO THE PROCEEDING

The petitioner, Parlor Furniture of Hickory, Inc., is a North Carolina Corporation, which has no subsidiaries, parent companies or affiliates.

Burlin B. Miller is the respondent. Georgia B. Miller is deceased.

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U.S. Constitution - Article 6

11 U.S.C. 365 (e)

REPORTED OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported at 79 NC App 639, 339 SE2d 804 (1986) and is printed in Appendix A hereto, infra, page A-1.

JURISDICTION

The judgment of the North Carolina Court of Appeals (Appendix B, page A-17) was entered on March 24, 1986, based on the opinion of the North Carolina Court of Appeals (Appendix A, page A-1) filed March 4, 1986. A timely Notice of Appeal and Petition for Discretionary Review to the Supreme Court of North Carolina was filed, which appeal was dismissed and Discretionary Review denied on June 3, 1986. On remand, the District Court granted Summary Judgment, which was appealed to the North Carolina Court of Appeals. A timely Notice of Appeal and Petition for Discretionary Review to the Supreme Court of North Carolina was filed, which appeal was dismissed and Petition

for Discretionary Review as denied on September 3, 1987 (Appendix B, page A-25) and which was certified by the North Carolina Court of Appeals to the Clerk of Court of Catawba County on September 10, 1987 (Appendix B, page A-25). The jurisdiction of this court is invoked, pursuant to 28 USC §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

This case involves Article I §8 of the Constitution of the United States:

> The congress shall have power ... to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

This case also involves the second paragraph of Article VI, of the Constitution of the United States:

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

This case also involves 11 USC §365 (e), 11 USC §365 (e) (1):

Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on -

(a) the insolvency or financial condition of the debtor at any time before the closing of the case;

(b) the commencement of a case under this Title [11 USCS §101 et seq.]; or

(c) the appointment of or taking possession by a trustee in a case under this Title [11 USCS §101 et

seq.] or a custodian before such commencement.

STATEMENT OF THE CASE:

On February 28, 1985, the respondent, Burlin B. Miller et vir Georgia B. Miller, filed a complaint in summary ejectment, demanding possession of the premises then leased and occupied by the petitioner. On the 8th day of March, 1985, judgment was entered by the Magistrate in favor of the respondents and the petitioner then gave notice of appeal for hearing de novo in the District Court for the twenty-fifth Judicial Distict of North Carolina. On the 28th day of March, 1985, the respondent, Burlin B. Miller et vir,

Georgia B. Miller, filed an Amended Complaint, which alleged a lease agreement in which the petitioner was the tenant and the respondents, Burlin B. Miller et vir, Georgia B. Miller, were the landlords. The lease agreement contained a clause giving the respondents rights to reenter the premises without further notice to the tenant, if and when the tenant shall petition to be or to be declared bankrupt or insolvent according to law. The complaint further alleged that the petitioner herein had filed a petition in Bankruptcy under Chapter 11 of the United States District Court and that said Petition in Bankruptcy was

dismissed. No other grounds for default were alleged in the Amended Complaint. The petitioners herein, filed a notice to dismiss the amended complaint of the respondents, Burlin B. Miller et vir, Georgia B. Miller, pursuant to Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure, for failure to state a claim upon which relief can be granted.

on May 14, 1985, the District Court of Catawba County entered an order allowing the Motion to Dismiss the amended complaint, pursuant to Rule 12 (b)(6) of the North Carolina Rules of Civil Procedure. The Trial Court found that 11 USC §365(e) was applicable to the facts, as alledged and therefore dismissed the plaintiff's complaint. (Appendix B, page A-11).

The respondents herein filed Notice of Appeal to the North Carolina Court of Appeals, which in an opinion, filed March 4, 1986, in the Court of Appeals, reversed the District Court Judge and amended the case, holding that 11 USC §365 (e)(1) did not apply to the facts as alleged. A timely Notice of Appeal and Petition for Discretionary Review was filed to the Supreme Court of North Carolina on April 3, 1986, in which the petitioner herein, raised again the applicability of 11 USC §365 (e)(1) to the facts, which involved an action in the nature of Summary Ejectment, in which the only default that was alleged, was the filing of a petition in Bankruptcy, by the tenant. The petitioner herein, further raised the applicability of Article 1 §8 of the

Constitution of the United States, which granted the power to Congress "to established... uniform laws on the subject of Bankruptcy throughout the United States and Article 6 of the Constitution of the United States, which required the judges in every state to be bound by the statutes passed by the Congress of the United States anything in the Constitution or laws of any state to the contrary notwithstanding. The Supreme Court of North Carolina refused to grant the petition for discretionary review and dismissed the appeal for lack of a substantial constitutional question on June 3, 1986.

On remand to the District Court for Catawba County, Summary Judgment was granted in favor of the landlord, the

respondents, Burlin B. Miller et vir, Georgia B. Miller herein, on the 25th day of June, 1986. (Appendix B, page _____). Notice of Appeal was given to the North Carolina Court of Appeals, which affirmed the ruling of the lower court. Petition for Discretionary review and Notice of Appeal was once more made to the Supreme Court of North Carolina on June 9, 1987, which once again raised the question as to the applicability of 11 USC §365 (e) (1) Article I §8 and Article 6 of the Constitution of the United States to the facts. On September 3, 1987, the Supreme Court of North Carolina dismissed the appeal and denied the Petition for Discretionary Review. (Appendix B, page A-25), which was then certified to the Clerk of Court of

Catawba County on September 10, 1987.

(Appendix B, Page A-27).

REASON FOR GRANTING WRIT:

Certiorari should be granted in order to determine and to demonstrate the supremacy of the laws relating to bankruptcy over state laws to the contrary. There are no Supreme Court decisions as to whether state courts can or are free to carve out exceptions to the plain language of 11 USC §365 (e)(1).

Leases throughout the United States are being drawn which still include language granting to the landlord the right to declare a lease in default whenever a tenant files a petition in bankruptcy. These clauses, known as "ipso facto" clauses, were declared in effective

by 11 USC §365 (e)(1), guidance should be given to the drafter of leases.

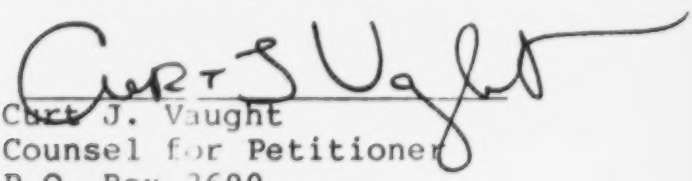
The North Carolina Court of Appeals created an exception to the effect that a dismissal of the petition in bankruptcy denies the debtor (tenant) the protection of 11 USC §365 (e)(1). In order to make this exception the North Carolina Court of Appeals necessarily chose to ignore the language "at any time", which is found in 11 USC 365 (e)(1).

The question presented by this writ is an important question of federal law (the supremacy of acts of congress when enacting laws regarding bankruptcy) which was decided by the North Carolina Court of Appeals in

such a way to deny the petitioner the protection of 11 USC §365 (e)(1). This question should be decided in such a way that state courts cannot invalidate or fail to acknowledge the protection granted by the congress. State Courts should not be allowed to carve out exceptions to the protection granted by 11 USC 365 (e)(1).

The Writ of Certiorari should be granted.

Respectfully Submitted,



Curt J. Vaught
Counsel for Petitioner
P.O. Box 3690
Hickory, NC 28603
(704) 324-9930

November 30, 1987

APPENDIX A

OPINION BELOW:

Burlin B. Miller, et vir

Georgia B. Miller

v.

Parlor Furniture of Hickory, Inc.

No. 8525dc707, Opinion of North Carolina Court of Appeals (Filed 4 March, 1986 AM 8:41) (Filed 1986 March 25 AM 9:31 Catawba County SCS)

Appeal by Plaintiffs from Vernon, Judge. Judgment entered 6 May 1985 in District Court, Catawba County. Heard in the Court of Appeals 6 November 1985.

By the terms of a written lease agreement, plaintiffs leased to defendant two buildings located on highway 70A in Catawba County. The

lease agreement provided, inter alia, for the payment of monthly rental and contained the following provision:

ARTICLE XII

> Tenant's Default
> [I]f the tenant shall petition to be or be declared bankrupt or insolvent according to law, ... or if proceedings for reorganization or for composition with creditors be instituted by or against such tenant, then ... the landlord may immediately or at any time thereafter and without further notice or demand, enter into and upon said premises or any part thereof and take absolute possession of the same ...

On 28 February 1985, plaintiffs filed a complaint in Summary Ejectment alleging that defendant had breached the lease by failing to pay rent. On 8 March 1985, judgment in favor of plaintiffs was entered by a magistrate. Defendant gave notice of appeal to the District Court. On 28 March 1985, plaintiffs filed an amended complaint in District Court

abandoning their claim for nonpayment of rent and alleging that defendant had defaulted, under Article XII of the lease agreement, by filing a Petition in Bankruptcy in the United States Bankruptcy Court for the Western District of North Carolina. The Amended Complaint alleged that defendant's petition in bankruptcy had been filed in March, 1983 under Chapter 11 and that it had been dismissed on 19 February 1985. Defendant moved pursuant to GS 1-1A, Rule 12 (b)(6), to dismiss the complaint for failure to state a claim. The trial court concluded that the provisions of 11 USC §365 (e) (1) prohibited plaintiffs from

enforcing the bankruptcy termination clause in the lease and dismissed the action. Plaintiffs Appeal.

Sigmon, Clark and Mackie, by Warren A. Hutton, for Plaintiff Appellants.

Curt J. Vaught for Defendant Appellee.

MARTIN, Judge.

11 USC §365 (e) (1) provides, in pertinent part:

Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or

obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on-

****

(b) the commencement of a case under this title;

the statute prohibits the termination of a lease due solely to the inclusion therein of an "ipso facto" or bankruptcy termination clause conditioned on the commencement of a bankruptcy case by or against the tenant. The issue presented on this appeal, however, is whether the prohibition of USC §365 (e)(1) remains applicable where there has been a dismissal of the bankruptcy proceedings which give rise to the claim of default.

In our view, a dismissal of the bankruptcy case divests the tenant of the protection afforded by the statute. Therefore, we reverse the order of the Trial Court.

In rendering "ipso facto" or bankruptcy termination clauses unenforceable pursuant to 11 USC §365 (e)(1), "Congress meant to foster the process by which a trustee or a Chapter 11 debtor in possession could assume a lease so that it could 'be utilized to assist in the debtor's rehabilitation or liquidation.'" (citation omitted). IN RE National Shoes, Inc., 9 Bankr. Ct. December (CRR) 11, 20 Bankr. (West) 55 (Bankr. S.D.N.Y. 1982). This purpose is apparent from other provisions of the statute giving the trustee of the debtor

the right, upon court approval, to assume or reject unexpired leases, 11 USC §365 (a); and to assign such a lease nothwithstanding a provision therein restricting assignments, 11 USC §365 (f). However, where the bankruptcy case is dismissed for failure of the debtor to comply with orders of the Bankruptcy Court, there no longer exists any reason to benefit the debtor or preserve the assets of the bankrupt estate by prohibiting enforcement of an otherwise valid bankruptcy termination clause. Such clauses "are not invalidated in to, by are merely made inapplicable during the case for the purpose of dealing with the ... unexpired lease." 9a Am. Jur. 2d Bankruptcy §523, at 61 (Citing H. R. Rep. No. 595, 95th Cong., 1st Sess. 349 (1977) (Emphasis Added).

Plaintiffs allege, and the record indicates, that defendants's Chapter 11 proceeding was dismissed by the Bankruptcy Court. The effect of a dismissed by the Bankruptcy Court. The effect of a dismissal is to "undo the Title 11 Case in so far as is practicable, and to restore all property rights to the position they occupied at the beginning of the case." 2 Collier on Bankruptcy p. 349.01, at 349-2 (15th ed. 1985) (Citing H. R. Rep.No. 595, 95th Congress, 1st Sess. 49 (1987). Thus, the dismissal of defendant's bankruptcy proceeding without any adjudication returned the parties to the same status which they had before the commencement of the case and the protection from the bankruptcy termination clause, afforded defendant

under 11 USC §365 (e) (1), was lost. Accordingly, we hold that the provisions of 11 USC §365 (e) (1) do not prevent plaintiffs from maintaining the present action.

A complaint should not be dismissed pursuant to GS 1-1a, Rule 12 (b) (6) unless, as a matter of law, plaintiff is not entitled to relief "under any state of facts which could be provided in support of the claim." Sutton v. Duke, 277 N.C. 94, 103, 176 S.E. 2d 161 (1970). Under North Carolina law, provisions in a lease authorizing the lessor to terminate the lease and take possession of the property in the event of the lessee's bankruptcy are valid and enforceable. Carson v. Imperial '400' National, Inc., 267 N.C. 229, 147 S.E. 2d 898 (1966). Plaintiffs' complaint

alleges the existence of such a clause in their lease of the subject property to defendant, and further alleges facts which, if true, would amount to a default thereunder by defendant. These allegations are sufficient to state a claim for relief. For the foregoing reasons, we reverse the order dismissing plaintiffs' complaint and remand this case to the District Court of Catawba County in order that the defendant may file answer and the case may proceed to a resolution on its merits.

Reversed and remanded.

Judges Arnold and Cozort concur.

APPENDIX B

JUDGMENTS OF COURT:

1. Judgment of District Court dismissing amended complaint.

Order (85CVM418, 85CVD442) (Filed 1985 May 14 AM 10:41)

Burlin B. Miller, et vir

Georgia B. Miller

v.

Parlor Furniture of Hickory, Inc.

This cause coming on to be heard before the undersigned judge on motion of plaintiffs pursuant to Rule 52 of the North Carolina Rules of Civil Procedure requesting findings of fact and conclusions of law supporting the order entered by this court of May 6, 1985, allowing defendant's motion to dismiss plaintiff's amended complaint pursuant

to Rule 12(b) (6) of North Carolina Rules of Civil Procedure for failing to state a claim upon which relief can be granted;

IT IS THEREFORE, ORDERED, that the following findings of fact and conclusions of law be entered in support of this court's order dismissing the plaintiff's amended complaint of May 6, 1985:

FINDINGS OF FACT

1. That plaintiffs' amended complaint alleges the following:

1. That plaintiffs are citizens and residents of Hickory, Catawba County, North Carolina.

2. That defendant is a corporation organized under and existing by virtue of the laws of the State of North Carolina.

3. That on or about July 10, 1974, plaintiffs and the defendant entered into a lease agreement.

4. That pursuant to the terms of said lease agreement, under Article 12 entitled "tenant default," plaintiff is given the right to reenter the premises without further notice to tenant if and when tenant shall petition to be or be declared bankrupt or insolvent according to law, or make any conveyance or general assignment for the benefit of creditors.

5. That sometime in March, 1983, the tenant filed a petition in bankruptcy under Chapter 11 in the United States District Court.

6. That on February 19, 1985, United States Bankruptcy Judge, Marvin R. Wooten, entered an order dismissing defendant's Chapter 11 proceedings without further notice to the defendant.

2. That on the 28th day of February, 1985, a Complaint in Summary Ejectment was filed by the plaintiffs requesting that the plaintiff be put in possession of the premises leased to defendant and that they recover rent in the amount of $3,830.64. That on the 8th day of March, 1985, judgment was entered in favor of plaintiffs.

3. That thereafter the defendant gave notice of appeal and the matter was appealed to the district court division.

4. On March 28, 1985, the plaintiffs filed their amended complaint.

5. That no answer has been filed by the defendant and on the 11th day of April, 1985, the defendant filed a motion to dismiss the plaintiff's amended complaint pursuant to Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure.

THEREFORE, based on the foregoing findings of fact, the court makes the following conclusions of law:

1. That this matter is properly before the district court of the twenty-fifth judicial district at is May 6, 1985 non-jury session of court for the purposes of ruling on the defendant's motion to dismiss

pursuant to Rule 12(b) (6) and the allegations in the plaintiffs' amended complaint are deemed to be true.

2. That Title 11 of USC §365 (e) prohibits the termination of an executory contract or an unexpired lease of the debtor solely because of a provision in such contract or lease that is conditioned on:

a. the insolvency or financial condition of the debtor at any time before the closing of the case;

b. the commencement of the case under this title; or

c. the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

3. That Title 11 of USC §365 (e) is applicable to this case.

4. That because of the applicability of Title 11 of USC §365 (e) the plaintiff's amended complaint fails to state a claim upon which relief can be granted.

THEREFORE, it is ordered that:

The plaintiff's amended complaint be dismissed for failing to state a claim upon which relief can be granted.

This the 14th day of May, 1985.

s/Livingston Vernon

District Court Judge Presiding

2. Judgment of the North Carolina Court of Appeals dated 24 March, 1986.

2. JUDGMENT

COURT OF APPEALS OF NORTH CAROLINA
No. 8525DC707

BURLIN B. MILLER et vir	)	Catawba County
GEORGIA B. MILLER	)	
vs.	)	
PARLOR FURNITURE OF	)	No. 85CVM418
HICKORY, INC.	)	85CVD442

This cause came on to be argued upon the transcript of the record from the Catawba County District Court. Upon consideration whereof, this Court is of opinion that there is -- error in the record and proceedings of said trial tribunal.

It is therefore considered and adjudged by the Court that this opinion of the Court, as delivered by the Honorable JOHN C. MARTIN Judge, be certified to the said trial tribunal to the intent that the JUDGMENT IS REVERSED AND CASE IS REMANDED FOR CAUSES INDICATED IN SAID OPINION.

And it is considered and adjudged

further, that the DEFENDANT DO PAY the costs of the appeal in this Court incurred, to wit, the sum of **** ONE HUNDRED THIRTY-FIVE AND NO/100 **** dollars ($135.00), and execution issue therefor. Certified to District Court this 24th day of March, 19 86.

Clerk of Court of Appeals

3. ORDER-SUPREME COURT OF NORTH CAROLINA No. 216p86

Burlin B. Miller, et vir

Georgia B. Miller

v.

Parlor Furniture of Hickory, Inc.

Upon consideration of the Notice of Appeal from the North Carolina Court of Appeals, filed by defendant in this matter pursuant to GS 7A-30, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the appeal is

"dismissed by order of the court in conference, this the 3rd day of June, 1986.

s/Billings, J.

For the Court"

Upon consideration of the petition filed by defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to GS 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"denied by order of the court in conference, this the 3rd day of June, 1986.

s/Billings, J.

For the Court"

THEREFORE, it is considered and adjudged further that defendant do pay the sum of nine and no/100 dollars ($9.00) and that execution issue therefor.

Witness my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June 1986.

s/J. Gregory Wallace

J. Gregory Wallace

Clerk of the Supreme Court

Copy To:

North Carolina Court of Appeals

Mr. Curt J. Vaught, Attorney at Law, for the Defendant

Sigmon, Clark & Mackie, Attorneys at Law, for the Plaintiffs

Mr. Ralph A. White, Appellate Court Reporter

West Publishing Company

Mead Data Corporation

4. Certification-No. 8525dc707 North Carolina Court of Appeals (filed 1986 June 11 am 11:14 NC Court of Appeals) (Filed 1986 June 13 AM 8:39) Catawba County CSC)

Burlin B. Miller, et vir
Georgia B. Miller
v.
Parlor Furniture of Hickory, Inc.

Appeal to review the decision of the Court of Appeals filed on March 4, 1986, was dismissed and petition for discretionary review was denied by order of the Supreme Court of North Carolina in conference on the 3rd day of June, 1986 and same has been certifed to the North Carolina Court of Appeals;

Burlin B. Miller, et vir
Georgia B. Miller
v.
Parlor Furniture of Hickory, Inc.

IT IS THEREFORE certified to the Clerk of Superior Court Catawba

County that the Supreme Court of North Carolina has dismissed the appeal and denied the petition for discretionary review in this cause.

Witness my hand and official seal this the 11th day of June, 1986,

Francis E. Dail
Clerk of Court of Appeals
s/Jeanne Stakeman
by Deputy clerk

XC: Curt J. Vaught
Sigmon, Clark and Mackie

No. 305P87 Twenty-Fifth District

SUPREME COURT OF NORTH CAROLINA

****

BURLIN B. MILLER, et vir GEORGIA B. MILLER	)	
	)	From Catawba
v	)	
	)	(8625DC1157)
PARLOR FURNITURE OF HICKORY, INC.	)	

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendant in this matter pursuant to G.S. §7A-30, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the appeal is

> "Dismissed by order of the Court in conference, this the 3rd day of September, 1987.
>
> s/ Whichard, J.
> For the Court"

Upon consideration of the petition filed by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

-"Denied by order of the Court in conference, this the 3rd day of September, 1987.

s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of September 1987.

J. GREGORY WALLACE
Clerk of the
Supreme Court

_____
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Curt J. Vaught, Attorney at Law, For The Defendant
Mr. Warren A. Hutton, Attorney at Law, For the Plaintiffs
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Compnay
Mead Data Corporation

NO. 8625DC1157
NORTH CAROLINA COURT OF APPEALS
****

BURLIN B. MILLER, et vir,
GEORGIA B. MILLER

V

PARLOR FURNITURE OF HICKORY, INC.

****

Appeal to review the decision of the Court of Appeals filed on May 5, 1987 was dismissed and petition for Discretionary Review was denied by order of the Supreme Court of North Carolina in Conference on the 3 day of September, 1987 and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Catawba County that the Supreme Court of North Carolina has dismissed the Appeal and denied the petition for Discretionary Review in this cause.

Witness my hand and official seal

this the 10 day of September, 1987.

_____

Clerk of Court of Appeals

_____

by Deputy CLerk

XC: Curt J. Vaught
Sigmon, Clark and Mackie

COA-52B

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on the attorney of record for the Respondent by placing a true copy of the same in the United States mail, postage prepaid, to wit:

Warren Hutton, Attorney for the Respondent, Burlin B. Miller
SIGMON, CLARK & MACKIE
P.O. Box 1792
Hickory, NC 28603

This the 1st day of December, 1987.

Curt J. Vaught
Attorney for the Defendant
Post Office Box 3690
Hickory, North Carolina 28603
Telephone: 704-324-9930

87-974

No.

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

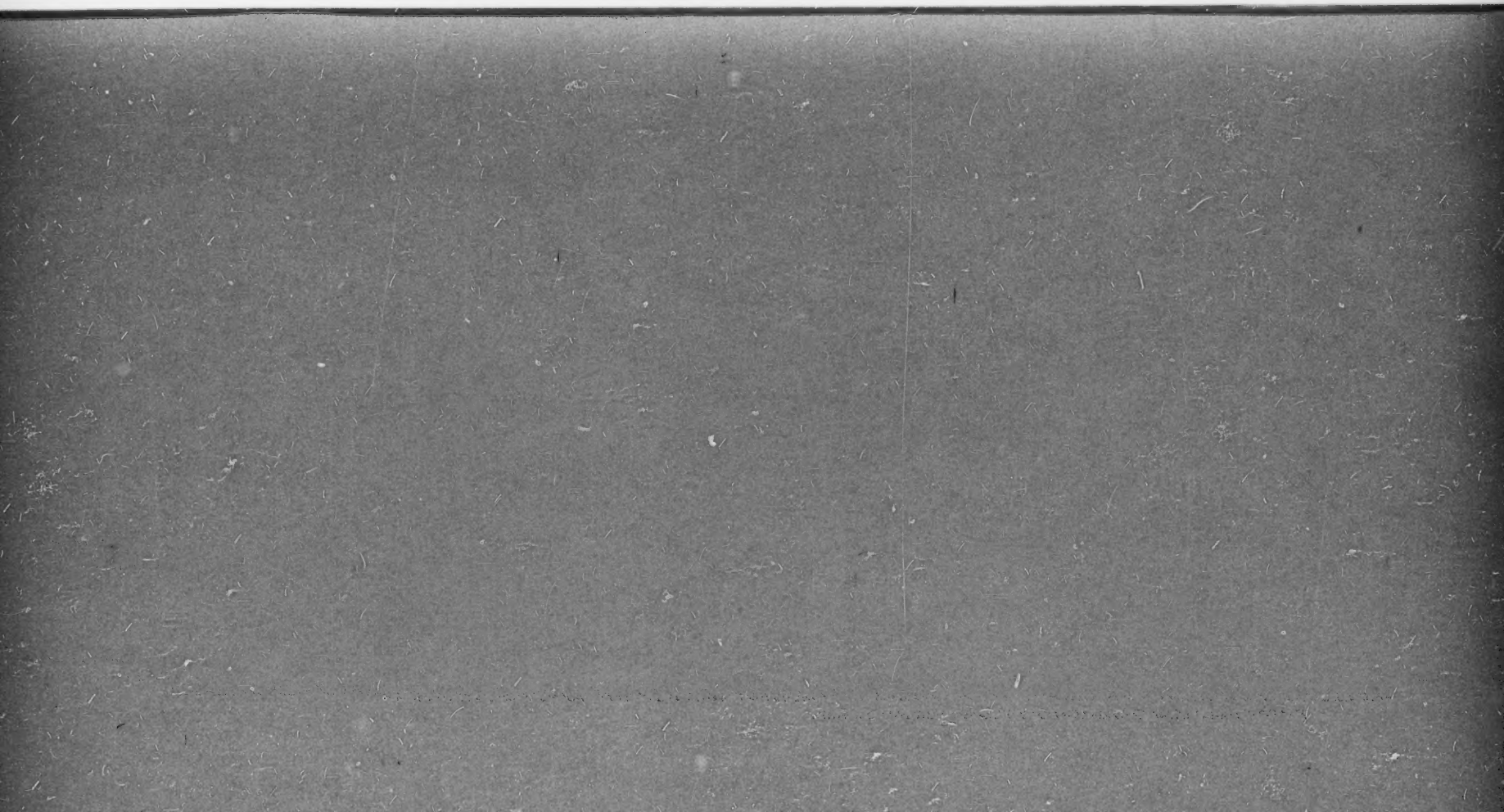
October Term, 1987

PARLOR FURNITURE OF HICKORY, INC.,
Petitioner,
v.
BURLIN B. MILLER
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

WARREN A. HUTTON
SIGMON, CLARK & MACKIE, P.A.
P.O. DRAWER 1470
HICKORY, NC 28603
(704) 328-2596
ATTORNEY FOR RESPONDENT

BEST AVAILABLE COPY



QUESTION PRESENTED FOR REVIEW

Whether the North Carolina common law of contracts, which would otherwise permit the respondents to terminate the lease of the petitioner, is preempted by the United States Bankruptcy Code, 11 *U.S.C.S.* § 365(e)(1) (Law. Co-op. 1985), even though the petitioner currently has no petition or case pending in the bankruptcy court?

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REASONS FOR DENYING THE WRIT

This case involves nothing more than the power of a North Carolina landlord to terminate the lease of a tenant pursuant to a so-called "ipso facto" clause entitling the landlord to terminate in the event that the tenant filed a petition in bankruptcy. In this case, the petitioner, Parlor Furniture of Hickory, Inc. (hereinafter referred to as Parlor Furniture), filed a petition in bankruptcy sometime in March 1983 which petition was dismissed by the bankruptcy court on February 19, 1985 (App. to Petition at A-13 - A-14). The lease between Parlor Furniture and respondent Burlin B. Miller and Georgia B. Miller (hereinafter referred to as the Millers),[1] specifically empowered the Millers as the lessors to terminate the lease if Parlor Furniture petitioned to be or was adjudicated to be bankrupt (*Id.* at A-13). Such provisions are enforceable under North Carolina common law. *See Carson v. Imperial '400' National, Inc.*, 267 N.C. 229, 147 S.E.2d 898 (1966). Nine days after Parlor Furniture's petition in bankruptcy was dismissed, the Millers filed a Complaint in Summary Ejectment seeking to end the lease on the basis of the ipso facto clause. The trial court held that the eviction was barred by 11 *U.S.C.S.* § 365(e)(1) (Law. Co-op. 1985). The North Carolina Court of Appeals reversed the trial court and remanded the case on the ground that § 365(e)(1) was not applicable because the petition in bankruptcy had been dismissed (*Id.* at A-4 - A-10). That ruling is the basis for Parlor Furniture's petition for a writ of certiorari.

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[1]The lease was executed by respondent Burlin B. Miller and his wife Georgia B. Miller. Mrs. Miller is not named as a respondent because she died during the course of the proceedings below.

Section 365(e)(1) of the Bankruptcy Code provides in pertinent part:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on –
>
> (B) the commencement of a case under this title. . . .

Prior to the enactment of this section, ipso facto clauses had been enforceable under § 70(b) of the former Bankruptcy Act. The legislative history to § 365 shows that it was enacted because of the adverse impact of ipso facto clauses upon the administration of the bankrupt's estate. As was stated in H.R. Rep. No. 95-595 to accompany H.R. Rep. No. 8200, 95th Cong., 1st Sess. (1977):

> Subsection (e) invalidates ipso factor [facto] or bankruptcy clauses. These clauses, protected under present law, automatically terminate the contract or lease, or permit the other contracting party to terminate the contract or lease, in the event of bankruptcy. This frequently hampers rehabilitation efforts. If the trustee may assume or assign the contract under the limitations imposed by the remainder of the section, then the con-

> tract or lease may be utilized to assist in the debtor's rehabilitation or liquidation.

(Reprinted at 11 *U.S.C.S.* § 365(e)(1).) That § 365(e)(1) was enacted in response to the adverse effects of ipso facto clauses on the administration of the bankrupt's estate was expressly recognized in *In re National Shoes, Inc.*, 20 B.R. 55, 57 (Bankr. S.D.N.Y. 1982). Moreover, the legislative history to § 365(e)(1) indicates that the ipso facto clause in question in a given case is not "invalidated in toto, but merely made inapplicable *during the case* for the purposes of disporition [disposition] of the executory contract or unexpired lease." H.R. Rep. No. 95-595, *supra* (emphasis added). Clearly, the focus of the statute is to assist the administration of the estate and nothing more. Hence, if the administration of an estate is not affected or involved, there is no reason to apply the statute.

That is precisely the case here. Parlor Furniture's petition in bankruptcy was dismissed. The obvious purpose of ipso facto clauses is to give the lessor protection if it appears, through specified and significant indicia, that the lessee is or may soon become financially unable to perform. *Cf. Uniform Commercial Code* § 2-609; *N.C. Gen. Stat.* § 25-2-609 (1985) ("When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return"). Parlor Furniture impliedly suggests that 11 *U.S.C.S.* § 365 was intended to ignore these legitimate interests of lessors. Such is not the case.

> The unenforceability of ipso facto or bankruptcy clauses proposed under this section will require the courts to be sensi-

> tive to the rights of the nondebtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or lease, the courts will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain.

H.R. Rep. No. 95-595, *supra*. Given the sensitivity that should be paid to the interests of lessors under the statute, there is no conceivable reason why North Carolina law should be preempted where there is no federal interest under the Bankruptcy Code to vindicate. Indeed, in light of the sensitivity that Congress intended the courts to pay to the interests of lessors, applying § 365(e)(1) where no federal interest is implicated would be contrary to the intention of Congress.

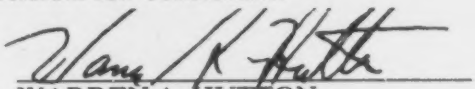
That the true issue presented here is one of preemption is beyond dispute. *See Allied Technology, Inc. v. R.B. Brunemann & Sons, Inc.*, 25 B.R. 484, 496 (Bankr. S.D. Ohio 1982) (because ipso facto clause was unenforceable, debtor's act of assumption cured the default, "a curing which is preemptive of any relevant state law"). Indeed, even though the term preemption is not used by Parlor Furniture in its petition, its reference to "the supremacy of acts of congress [sic] when enacting laws regarding bankruptcy" (Petition at 14) and its citation of *U.S. Const.* art. I, § 8 (Petition at 3) leave no doubt that the instant case is one involving the doctrine of preemption.

The courts have long recognized that, while the federal bankruptcy laws do preempt state law, they do so only where the state law conflicts with the federal law. *See, e.g., Stellwagen v. Clum*, 245 U.S. 605 (1918); *Hayden v. McDonald*, 719 F.2d 266, 273 (8th Cir. 1983) (citing cases). This view is, of course, consistent with the doctrine of

preemption as generally applied. *See, e.g., Rose v. Arkansas State Police*, 107 S. Ct. 334 (1986). Preemption of state law, morever, is not to be lightly presumed. *California Federal Savings & Loan Association v. Guerra*, 107 S. Ct. 683 (1987). In the instant case, Parlor Furniture has offered no reason to presume that state law ought to be preempted. Parlor Furniture simply relies on the "plain language" of § 365(e)(1) and the complaint that the North Carolina Court of Appeals improperly "carved out an exception" to the statute (Petition at 13-15). In fact, the North Carolina Court of Appeals merely recognized that the purposes behind the enactment of § 365(e)(1) were of no relevance to the present case. This is evident from the legislative history of the statute and the cases which have interpreted it. Inasmuch as preemption is not to be lightly presumed and inasmuch as § 365(e)(1) was not intended to apply to the instant situation, the Millers contend that the North Carolina Court of Appeals properly analyzed the issues in this case. Hence, there is no need for this Court to hear the case because no federal question is even presented. The question here should be treated as being solely a matter of North Carolina common law which, in this case, is of no interest to the federal courts because it in no way impairs federal policy.

CONCLUSION

For the reasons specified in the foregoing brief, the respondent, Burlin B. Miller, respectfully requests the Court to deny the petition for certiorari.



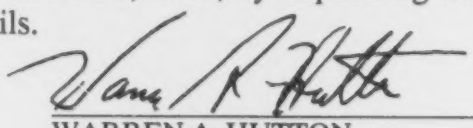
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the opposing attorney of record:

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this 31st day of December, 1987, by depositing same in the United States Mails.



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